STATE OF CALIFORNIA

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February 18, 2000

Honorable Kenneth O. Reimers, Assessor
County of Butte
25 County Center Drive
Oroville, CA 95965-3382

ATTN: Donald C. Willis

Re: Taxation of Native American Property

Dear Mr. Willis:

This is in reply to your letter to Chief Counsel Timothy W. Boyer dated December 20, 1999 regarding the taxation of real property and personal property held by Native American tribes and tribal members both on and outside of reservations.

As discussed further below, it is our opinion that lands held in trust for Indian tribes and tribal members are immune from real property taxation. (Letter Question #1.) However, if tribes or individual members own lands in fee, even within the boundaries of a reservation, then the lands will be subject to real property taxes. (Letter Questions #2, 5, and 8.) The treatment of personal property taxation is similar. If personal property or business personal property is located on land held in trust, then such property will be immune from taxation. However, personal property and business personal property located on lands held in fee by Indian tribes and tribal members will be subject to taxation. (Letter Questions #3, 4, 6, 7, and 9.)

Law and Analysis—Real Property

1. Real Estate Owned in Trust for a Federally-Recognized Tribe (Letter Question #1) and

2. Real Estate Owned in the Name of a Federally-Recognized Tribe Acquired from Private Ownership (Letter Question #2) and

3. Real Estate Owned by a Tribal Member of a Federally-Recognized Tribe Acquired from Private Ownership (Letter Question #5) and

4. Homes Sold by a Federally-Recognized Tribe on Lands Outside of the Reservation to Tribal Members (Letter Question #8)

BACKGROUND

Over the last 150 years, the Federal government's policy regarding the allotment of lands to Indians has evolved. In the late nineteenth century, the prevailing national policy of segregating lands for the exclusive use and control of Indian tribes gave way to a policy of allotting land to Indians individually. Because of problems associated with this policy, e.g., the loss of land by Indian allottees by fraud or by sale, compromising Congress' purpose of the assimilation of Indians into society at large, Congress sought to resolve these problems with the Indian General Allotment Act of 1887 (known as the "Dawes Act"). (Although other statutes were also enacted for the allotment of Indian lands, the Indian General Allotment Act of 1887 was the primary means utilized by Congress for allotting Indian lands.)

The Indian General Allotment Act of 1887 empowered the President to allot most tribal lands nationwide without the consent of the Indian nations involved. Section 5 of the Act, 25 USCS § 348[1], restricted immediate alienation or encumbrance of property by providing that each allotted parcel would be held by the United States in trust for at least 25 years before a fee patent, free of any encumbrance, would be issued to an Indian allottee. Section 6 of the Act, 25 USCS § 349, as amended by the Burke Act of 1906, provides that upon the expiration of the trust period and the receipt of a patent in fee, an allottee would be subject to state jurisdiction. Section 6 also provides that the Secretary of the Interior could issue an allottee a fee patent prior to the expiration of the 25-year trust period without subjecting the allottee to state jurisdiction, however, all restrictions as to sale, encumbrance, and taxation of the allotted land would be removed.

The policy of allotment came to an end in 1934 with the passage of the Indian Reorganization Act. With this statute, Congress halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted, but not yet fee-patented, Indian lands and provided for restoring unallotted surplus Indian lands to tribal ownership and for acquiring land, on behalf of tribes, within or without existing reservations. The Indian Reorganization Act, however, imposed no restraints on the ability of existing Indian allottees to alienate or encumber their fee-patented lands.

ANALYSIS

As a result of this varied history of statutes regarding the ownership of lands by Indians, there are a variety of manners in which individual Indians or tribes may "own" realty, including the following: (1) land held in trust for tribes as reservations; (2) land allotted to individual Indians but held in trust for a period of time; (3) fee-patented land owned by individual Indians or by tribes within reservation boundaries, acquired either (a) prior to enactment of the Indian

[1] 25 USCS § 348 provides in part "Upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. . . . "

General Allotment Act of 1887, or (b) as a result of the Indian General Allotment Act of 1887; (4) fee-patented land owned by individual Indians or by tribes within reservation boundaries sold to non-Indians and later reacquired from non-Indians; and (5) land owned by individual Indians or tribes outside of reservation boundaries acquired from non-Indians.

According to 25 USCS § 465, enacted as part of the 1934 Indian Reorganization Act, when the Secretary of the Interior takes title to land in the name of the United States in trust for an Indian tribe or an individual Indian, the land or rights acquired shall be exempt from state and local taxation. 25 USCS § 465 provides in part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
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> . . .
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> Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

The United States Supreme Court has stated that state and local governments cannot tax reservation land "`absent cessation of jurisdiction or other federal statutes permitting it.'" County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 258 (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)). The Supreme Court went on to state that it had consistently declined to find that Congress has authorized such taxation unless it had "`made its intention to do so unmistakably clear.'" Yakima at 258 (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985)).

Based on the above Supreme Court opinions and 25 USCS § 465, it is the opinion of Board legal staff that any land held in trust by the Department of Interior through the Bureau of Indian Affairs for tribes or for individual Indians is exempt from real and personal property taxation as such property is considered owned by the United States and thus, immune from taxation (Article XIII, Section 1 of the California Constitution). As such, land held in trust for tribes as reservations and land held in trust for individual Indians would not be subject to property taxation.

If land is owned by a tribe or by an individual Indian in fee, however, the immunity from taxation no longer applies. The United States Supreme Court in County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251 (1992), held that the Indian General Allotment Act of 1887 permitted a county to impose an ad valorem tax on reservation land patented in fee pursuant to the Act and owned by reservation Indians or by the tribe itself. This case involved the Yakima Indian Nation which had a reservation in southeastern Washington.

Eighty percent of the reservation's land was held in trust for the benefit of the tribe or its members. The balance of the reservation's land was owned in fee by individual Indians and non-Indians, as a result of patents distributed during the allotment era, and by the Yakima Indian Nation itself. Pursuant to Washington law, Yakima County imposed an ad valorem levy on taxable real property in the county.

The Supreme Court found that

> Liability for the ad valorem tax flows exclusively from ownership of realty on the annual date of assessment. . . . The tax, moreover, creates a burden on the property alone. . . . The Court of Appeals held, . . . and we agree, that this ad valorem tax constitutes "taxation of land" within the meaning of the General Allotment Act and is therefore prima facie valid. 502 U.S. 251, 266.

The Court's rationale for its decision was based upon Section 6 of the Indian General Allotment Act of 1887 (25 USCS § 349), as amended by the Burke Act of 1906. 25 USCS § 349 provides that

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided,* That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further,* That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States. *And provided further,* That the provisions of this Act shall not extend to any Indians in the former Indian Territory.

The Supreme Court's rationale was that state tax laws were among the laws to which Indian allottees became subject under Section 6 upon the expiration of the trust period. By specifically mentioning immunity from land taxation as one of the restrictions that would be removed upon conveyance of the land in fee, Congress manifested a clear intention to permit states to tax Indian lands. 502 U.S. 251, 259. The Court went on to state that

> . . . when Congress, in 1934, while putting an end to further allotment of reservation land, . . . chose *not* to return allotted land to pre-General Allotment Act status, leaving it fully alienable by the allottees, their heirs, and assigns, . . . it chose not to terminate state taxation upon those lands as well. (Emphasis in original.) 502 U.S. 251, 264.

As a result, the Court found that the Indian General Allotment Act of 1887 permitted the county to impose an ad valorem tax on reservation land patented in fee pursuant to the Act. The Court

unfortunately, however, left open the question whether the treatment of land patented in fee under a statute in force prior to the Indian General Allotment Act of 1887 would also be the same.

As a follow-up to Yakima, the United States Supreme Court in 1998 considered the taxability of land, within reservation boundaries, purchased by a tribe from non-Indians. In Cass County v. Leech Lake Band, 524 U.S. 103, 141 L.Ed.2d, 90 (1998), the Court held that state and local governments may impose ad valorem taxes on reservation land that was made alienable by Congress and sold to non-Indians by the Federal Government and later repurchased by a tribe. In this case, the Leech Lake Band of Chippewa Indians purchased parcels of land within the boundaries of the reservation that had previously been allotted and sold to non-Indians under the Nelson Act of 1889, a statute which had provided for the allotment and sale of a portion of the reservation land to non-Indians.

Relying on the Court's decision in Yakima, the Court in Cass County found that

> . . . once Congress has demonstrated (as it has here) a clear intent to subject the land to taxation by making it alienable, Congress must make an unmistakably clear statement in order to render it non-taxable. . . . The subsequent repurchase of reservation land by a tribe does not manifest any congressional intent to reassume federal protection of that land and to oust state taxing authority—particularly when Congress explicitly relinquished such protection many years before. Cass County, 141 L.Ed.2d, 90, 99-100.

This case follows the rationale of the Court's decision in Yakima, in that once property has been patented in fee, absent a specific intent by Congress to exempt the property from taxation, property will be subject to taxation pursuant to Sections 5 and 6 of the Indian General Allotment Act of 1887. As a result of Yakima and Cass County, fee-patented lands either within reservation boundaries or outside of reservation boundaries, acquired by Indians or tribes from non-Indians, are subject to property taxation. Similarly, regarding your Question #8, any homes sold outside of a reservation by a tribe to tribal members would be subject to property taxation.

Regarding your question as to what constitutes a "reservation", the United States Supreme Court in Oklahoma Tax Commission v. Potawatomi Tribe, 498 U.S. 505 (1991), while not defining this term, found that no distinction between land held in trust and reservation land. The Court stated that land held in trust by the Federal government for the benefit of Indians is validly set apart and qualifies as a reservation for tribal immunity purposes. 498 U.S. 505, 511.

Law and Analysis—Personal Property

5. Personal Property Located on Real Estate, Acquired from Private Ownership, Owned in the Name of a Federally-Recognized Tribe (Letter Question #3)

6. Business Property Leased to a Tribe on Real Estate, Acquired from Private Ownership, Owned in the Name of a Federally-Recognized Tribe (Letter Question #4)

7. Business Property, Located Off of the Reservation, Owned by a Federally-Recognized Tribe (Letter Question #6)

8. Business Personal Property, Located at his Home, Owned by a Tribal Member (Letter Question #7)

9. Business Personal Property, Located Off of the Reservation, Owned by a Tribal Member (Letter Question #9)

The general rule that applies to personal property taxation was stated by the United States Supreme Court in Bryan v. Itasca County, 426 U.S. 373 (1976). The Court held that personal property owned by an Indian residing on reservation land held in trust and used on that land is not subject to personal property tax. The treatment of personal property, including business personal property, for purposes of taxation then is consistent with the treatment of real property for purposes of taxation. As such, personal property not located within reservation land held in trust will be subject to personal property taxation.

In Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), the United States Supreme Court held that a state could impose a gross receipts tax on a ski resort operated by a tribe on off-reservation land that the tribe had leased from the Federal government. The Court emphasized that the tribe operated the ski resort on land located outside of the boundaries of the reservation. In addition, no part of the ski resort enterprise, including buildings and equipment, were located within the boundaries of the reservation. The Court stated that absent express law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state laws, including tax laws that would be applicable to all citizens of the state. As such, any personal property owned by Indians or tribes outside of reservation land held in trust would be subject to personal property taxation. In addition, personal property taxation would also apply to the leased property mentioned in your Question #4, as such property would be located upon land purchased from private ownership.

The views expressed in this letter are only advisory in nature; they represent the analysis of the legal staff of the Board based on present law and the facts set forth herein, and are not binding on any person or public entity.

Very truly yours,

Anthony S. Epolite
Tax Counsel

ASE:jd
precednt/genexemp/00/03ase

cc: Mr. Richard Johnson, MIC:63
Mr. David Gau, MIC:64
Mr. Charlie Knudsen, MIC:62
Ms. Jennifer Willis, MIC:70

State of California Board of Equalization

Memorandum

To : Mr. Verne Walton Date May 7, 1990

From : Ken McManigal

Subject : Taxability Of Indian-Owned Fee Lands On Indian Reservations

This is in response to your February 7, 1990 memorandum to Richard Ochsner wherein you forwarded various documents pertaining to the taxability of Indian-owned fee lands within Indian reservations and you requested our opinion in that regard. As hereinafter indicated, we are of the opinion that until such time as Congress authorizes state or local property taxation of lands of enrolled tribal members within an Indian reservation, such lands are immune from state or local property taxation.

As capsulized by Ms. Mary J. Risling in her November 1, 1989 letter to Mr. Stephen Strawn, Humboldt County Tax Collector, on page 2:

> "For many years, a number of states have taxed Indian owned fee property within reservation boundaries. Indeed, in a 1979 opinion, the Interior Solicitor's office indicated that such properties are subject to state property tax. Increasingly, however, this situation is changing. In 1988 the federal district court for the eastern district of Washington joined a number of state courts in holding that Indian owned fee lands within a reservation are not subject to state property tax. Additionally, an increasing number of state attorney general opinions have been issued which reflect the conclusion reached by the district court. Finally, in March of 1989, the Interior Solicitor's office issued its modified opinion on this question and concluded that states have no jurisdiction to tax Indian owned fee property within reservations."

As several of the documents indicate, however, the United States Supreme Court (Supreme Court) and the California appellate courts have yet to decide whether fee lands of enrolled tribal members within an Indian reservation are subject to state or local property taxation. Thus, as with all unresolved property tax matters, Article XIII, Section 1 of the California Constitution, which states, in part, that unless otherwise provided by the laws of the United States all property is

taxable, is controlling. The question is whether the laws of the United States provide "otherwise".

In Squire v. Capoeman (1955) 351 U.S. 1, 100 L Ed 883, 76 S Ct 611, the United States, holder of title to Quinaielt Indian Reservation land, contracted for the sale of the timber thereon and received, on behalf of Indians who had been allotted the land, the proceeds of sale. Plaintiff, an Indian allottee, paid a capital gains tax on the portion of the sale price allocable to his land and sought a refund thereof because the taxation of the proceeds was violative of the 25 USC Sec. 349 allotment statute:

> "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: And provided further, That the provisions of this Act shall not extend to any Indians in the former Indian Territory."

The District Court agreed and ordered the refund; and in affirming, the Supreme Court stated at pages 7 and 8:

> ". . .The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted."

Thus, Squire v. Capoeman, supra, suggested that upon the issuance of a patent in fee to an Indian, his or her land would

be subject to state or local property taxation. Some 35 years later, however, the Supreme Court has yet to be presented with such a case and hence, has yet to so hold.

Rather, in Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, 36 L Ed 2d 114, 93 S Ct 1267, the Supreme Court considered government land leased to the Mescalero Apache Tribe as land taken in the name of the United States in trust for the Tribe and exempt from state ad valorem property taxation within the meaning of 25 USC Sec. 465. It then proceeded to conclude, in part, that personal property permanently attached to the land should likewise enjoy that immunity and not be subject to New Mexico use tax. While the Supreme Court discussed Squire v. Capoeman, supra, it did so in that part of its decision pertaining to the applicability of New Mexico's gross receipts tax to the Tribe's off-reservation business enterprise and thus, it was not called upon to and did not expand upon its earlier interpretation of section 349.

Prior to considering the scope of immunity specifically afforded by section 465 under these circumstances, the Supreme Court "decline[d] the invitation to resurrect the expansive version of the intergovernmental immunity doctrine that has been so consistently rejected in modern times." Thus, this case also eliminated the federal-instrumentality doctrine as a basis for immunizing Indians from state taxation.

At the same time, having eliminated the federal-instrumentality doctrine, in McClanahan v. Arizona State Tax Commission (1973) 411 U.S. 164, 36 L Ed 2d 129, 93 S Ct 1259, the Supreme Court proceeded from the premise that whether state taxation of Indians was permissible was dependent upon applicable treaties and federal statutes which define the limits of state power. The Supreme Court concluded that by treaty and by statute Arizona had no jurisdiction to impose its income tax on the income of Navajo Indians residing on the Navajo Reservation and whose income was wholly derived from reservation sources. While it cited Squire v. Capoeman, supra, as a previous instance in which it had construed ambiguous language as providing a tax exemption for Indians, again, the Supreme Court was not called upon to and did not expand upon its earlier interpretation of section 349.

The Supreme Court summarized the import of McClanahan v. Arizona State Tax Commission, supra, in Mescalero Apache Tribe v. Jones, supra, thusly at page 148:

> ". . .[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing

> Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." (Emphasis added)

Thus, while the issue addressed was whether Arizona could impose its income tax on the reservation income of reservation Indians, the Supreme Court's pronouncement, that congressional consent was necessary for taxing reservation incomes of reservation Indians, was extended to encompass the taxing of Indian reservation lands as well. This pronouncement was often referred to in subsequent Supreme Court cases pertaining to Indians, Indians' property, and property taxation.

For example, in Moe v. The Confederated Salish and Kootenai Tribes (1976) 425 U.S. 463 48 L Ed 2d 96, 96 Ct 1634, the Supreme Court again dealt with personal property, this time personal property/motor vehicles of Indians living on the Flathead reservation. Upon consideration of applicable treaties and federal statutes, the Supreme Court concluded, in part, that Montana could not impose a personal property tax on the motor vehicles of Indians as a condition precedent for registration thereof. In so doing the Supreme Court referred back to McClanahan v. Arizona State Tax Commission, supra, at page 475 and to the Mescalero Apache Tribe v. Jones, supra, characterization of McClanahan v. Arizona State Tax Commission, supra, at page 476:

> "In McClanahan this Court considered the question whether the State had the power to tax a reservation Indian, a Navajo, for income earned exclusively on the reservation. We there looked to the language of the Navajo treaty and the applicable federal statutes 'which define the limits of state power.' 411 US, at 172, 36 L Ed 2d 129, 93 S Ct 1257. Reading them against the 'backdrop' of the Indian sovereignty doctrine, the Court concluded 'that Arizona ha[d] exceeded its lawful authority' by imposing the tax at issue. Id., at 173, 36 L Ed 2d 129, 93 S Ct. 1257. In Mescalero, the companion case, the import of McClanahan was summarized: '[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent'. 411 US, at 148, 36 L Ed 2d 114, 93 S Ct. 1267."

As to Montana's contention that the District Court failed to properly consider the effect of section 349, the Supreme Court's analysis at pages 477-479 was as follows:

> "The State relies on Goudy v. Meath, 203 US 146, 51 L Ed 130, 27 S Ct. 48 (1906), where the Court, applying the above section, rejected the claim of an Indian patentee thereunder that state taxing jurisdiction was not among the 'laws' to which he and his land had been made subject. Building on Goudy and the fact that the General Allotment Act has never been explicitly 'repealed,' the State claims that Congress has never intended to withdraw Montana's taxing jurisdiction, and that such power continues to the present.
>
> "We find the argument untenable for several reasons. By its terms section 6 (Sec. 349) does not reach Indians residing or producing income from lands held in trust for the Tribe, which make up about one-half of the land area of the reservation. If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on 'fee patented' lands, then for all jurisdictional purposes-civil and criminal--the Flathead Reservation has been substantially diminished in size. A similar claim was made by the State in Seymour v. Superintendent, 368 US 351, 7 L Ed 2d 346, 82 S Ct 424 (1962), to which we responded: '[The] argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government.' Id., at 358, 71 L Ed 346, 82 S Ct. 424.
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> "We concluded that '[s]uch an impractical pattern of checkerboard jurisdiction,' ibid., was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction. See also United States v. Mazurie, 419 US 544, 554-555, 42 L Ed 2d 706, 95 S Ct 710 (1975).
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> "The State's argument also overlooks what this Court has recently said of the present effect of the General Allotment Act and related legislation of that era: 'Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be

> abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways. See section 6 of the General Allotment Act, 24 State. 390. . . .' Mattz v. Arnett, 412 US 481, 486, 37 L Ed 2d 92, 93 S Ct 2245 (1973) 'The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, now amended and codified as 25 USC section 461 et seq.. . .'
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> "The State has referred us to no decisional authority--and we know of none--giving the meaning for which it contends to section 6 (Sec. 349) of the General Allotment Act in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands--statutes discussed, for example, in McClanahan, 411 US, at 173-179, 36 L Ed 2d 129, 93 S Ct 1257. See also Kennerly v. District Court of Montana, 400 US 423, 27 L Ed 2d 507, 91 S Ct 480 (1971). Congress by its more modern legislation has evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area."

Thus, section 349 was eliminated as a basis of jurisdiction to impose a personal property tax upon the personal property of Indians residing on an Indian reservation.

Soon after, in Bryan v. Itasca County (1976) 426 U.S. 373, 48 L Ed 2d 710, 96 S Ct 2102, the Supreme Court again dealt with personal property, this time personal property/mobile home of an enrolled tribal member situated on the Leach Lake reservation. Relying upon McClanahan v. Arizona State Tax Commission, supra, and Moe v. The Confederated Salish And Kootenai Tribes, supra, the Supreme Court concluded that Itasca County could not impose a personal property tax on the mobile homes. Section 349 having been eliminated as a possible authority for taxing reservation Indians, the Supreme Court addressed Itasca County's contention that the grant of civil jurisdiction to the states conferred by 28 USC Sec. 1360 was a congressional grant of power to tax reservation Indians except insofar as taxation was expressly excluded by the terms of the statute and concluded that it was not:

> "Piecing together as best we can the sparse legislative history of section 4 (Sec. 1360), subsection (a) seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private

> citizens, by permitting the courts of the States to decide such disputes; . . . . This construction finds support in the consistent and uncontradicted references in the legislative history to 'permitting' 'State courts to adjudicate civil controversies' arising on Indian reservations, HR Rep No. 848, pp. 5, 6 (emphasis added), and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations. In short, the consistent and exclusive use of the terms 'civil causes of action,' 'aris[ing] on,' 'civil laws. . .of general application to private persons or private property,' and 'adjudica[ion],' in both the Act and its legislative history virtually compels our conclusion that the primary intent of section 4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court." (pp. 383-385)

Accordingly, with respect to the taxation of personal property of enrolled tribal members situated on a tribal reservation, it is clear that absent any congressional grant of power to tax, such personal property is immune from state or local property taxation. And we are not aware of any subsequent congressional grant of power to tax such property.

While the Supreme Court and the California appellate courts have yet to decide whether fee lands of enrolled tribal members within an Indian reservation are subject to state or local property taxation, several of the various documents you forwarded, relying upon the above-mentioned cases and/or language therefrom, have concluded that they are not:

1. Battese v. Apache County (1981) Ariz. 630 P. 2d 1027

2. March 31, 1982, Idaho Deputy Attorney General's Memorandum

3. March 14, 1983, Oregon Assistant Attorney General's Opinion

4. April 11, 1985, North Dakota Attorney General's Opinion No. 85-12.

5. March 20, 1989, United States Department of the Interior Associate Solicitor's Memorandum to Field Solicitor, Twin Cities.

The most authoritative of these, of course, is the Arizona Supreme Court case of Battese v. Apache County, supra. In that case, Arizona sought to tax two lots and improvements located within the boundaries of the Navajo reservation, surrounded by Indian trust lands, and owned by enrolled members of the Navajo tribe. The members/owners had acquired the properties from successors in interest of the original non-Indian homesteader

who had received his patent therefor from the United States government in 1909. While the properties had bordered the then existing Navajo reservation in 1902 when the homestead entry commenced, they were within the boundaries of the enlarged Navajo reservation when acquired.

Relying upon McClanahan v. Arizona State Tax Commission, supra, Mescalero Apache Tribe v. Jones, supra, and Moe v. Confederated Salish and Kootani Tribes, supra, personal property tax and income tax cases, the court concluded at page 1028:

> "Today the exemption of Indian lands and Indian income from state taxation is based upon the doctrine of federal preemption. . . ."

The court then quoted from Moe v. Confederated Salish and Kootenai Tribes, supra, at page 1029:

> ". . .In Mescalero, the companion case, the import of McClanahan was summarized: '[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Commission, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.' 411 U.S., at 148, 93 S. Ct., at 1270, 36 L. Ed. 2d, at 119." (Emphasis added).

Thus, the court held at page 1029:

> ". . .The relevant cases which have applied the McClanahan analysis, discussed infra, exemplify the position that the property's status as trust, non-trust, and/or fee-patented land, is not determinative of the property's status as exempt from state taxation. The exemption applies if the subject property is owned by enrolled Navajo tribal members and is located within the present physical boundaries of the Navajo reservation."

As to the state's contention that McClanahan v. Arizona State Tax Commission, supra, and other cases were distinguishable because the original "non-Indian fee-patented" title removed the Batteses' land from those being included within the term "Indian reservation lands," for tax exemption purposes, the court stated at page 1029 also:

> ". . .The language used in the Acts and authorities mentioned to describe the lands which have been reserved to

> the Indians, and accordingly removed from state jurisdiction, includes 'reservation lands,' 'Indian property,' 'property within the exterior boundaries of a reservation,' 'property within the limits of a reservation,' and 'Indian country,' as defined in 18 U.S.C. section 1151(a) for criminal jurisdictional purposes. We conclude that the Batteses' property comes within those lands Congress intended to be exempt from state taxation."

See also Estate of Johnson (1981) 125 Cal.App. 3d 1044, wherein the District Court of Appeal discussed Mescalero Apache Tribe v. Jones, supra, McClanahan v. Arizona State Tax Commission, supra, Moe v. The Confederated Salish and Kootenai Tribes, supra and Bryan v. Itasca County, supra, when considering California's imposition of its inheritance tax upon the intestate transfer of fee patent real property of a deceased, formerly enrolled tribal member situated on the Hoopa Valley reservation. In concluding that neither section 6 (Sec. 349) of the General Allotment Act nor section 4 (§ 1360) of Public Law 280 conferred jurisdiction on California to impose its inheritance tax upon the intestate transfer of non-trust reservation real property from one reservation Indian to another, the court stated at pages 1049 and 1050:

> "Here, as in Moe, the reservation is composed of both trust and fee lands. Although the present case involves an inheritance tax while Moe involved a cigarette sales tax and personal property taxes, we deem this a distinction without a difference, for, in each case, a distinction based upon the fee or trust status of land would undermine the territorial integrity of a reservation. . . ."

Such was the case even though the land in the hands of the deceased, formerly enrolled tribal member had been subject to local property taxation:

> "[3]Appellant maintains that, because lands held by fee patent are subject to property taxes, the intestate transfer of a fee patentee's property should also be subject to inheritance tax. Whether such lands are subject to a property tax (see, e.g. Chatterton v. Lukin (1945) 116 Mont. 419 [154 P. 2d 798] cert. den. 325 U.S. 880 [89 L. Ed. 1996, 65 S Ct 1572]; United States v. Spaeth (D. Minn. 1938) 24 F. Supp.465), however, is not the issue, for an inheritance tax is not a tax upon the property itself but rather upon its transfer. . . ." (p. 1050)

Note, however, that Chatterton v. Lukin, supra, and United States v. Spaeth, supra, in addition to being cases decided by

courts of inferior jurisdiction, are well prior to Mescalero Apache Tribe v. Jones, supra, etc, discussed herein above.

In sum, in spite of the absence of an express Supreme Court or California appellate court determination as to whether fee lands of enrolled tribal members within an Indian reservation are subject to state or local property taxation, the principle that absent any congressional grant of power to tax, property of enrolled tribal members situated on an Indian reservation is immune from such taxation, developed in the above-mentioned personal property and income tax cases, has been discussed by the Supreme Court in terms of the taxing of Indian reservation lands as well and construed by the Arizona Supreme Court and others as applying to lands of enrolled tribal members situated on an Indian reservation. While it remains to be seen whether this is an accurate construction and application of the principle as applied to Indian lands, given the history and cases pertaining to the taxation of Indians over the years, we believe that it is. And in this regard, we are not aware of any congressional grant of power to tax lands of enrolled tribal members within an Indian reservation.

Accordingly, we conclude that the language of Article XIII, section 1 of the California Constitution should be construed and applied together with the federal principle that absent any congressional grant of power to tax, lands of enrolled tribal members within an Indian reservation are not subject to state or local property taxation. Absent such grant, the laws of the United States, in effect, preclude state or local taxation. In our view then, until such time as Congress authorizes state or local property taxation of lands of enrolled tribal members within an Indian reservation, the California Constitution recognizes that such lands are immune from such property taxation.

We are returning the documents which you forwarded herewith.

JKM:mw
3219H

Attachments

cc: Mr. John Hagerty
Mr. Gene Palmer
Ms. Rose Marie Carlos
Mr. Joe Nicosia

Memorandum

To : Mr. Verne Walton Date May 22, 1990

From : Ken McManigal

Subject: Taxability of Indian-Owned Fee Lands On Indian Reservations

Reference is made to my May 7, 1990 memorandum to you, summarized in your May 14, 1990 letter to Humboldt County Treasurer-Tax Collector Stephen A. Strawn thusly:

> "Accordingly, we conclude that the language of Article XIII, section 1 of the California Constitution should be construed and applied together with the federal principle that absent any congressional grant of power to tax, lands of enrolled tribal members within an Indian reservation are not subject to state or local property taxation. Absent such grant, the laws of the United States, in effect, preclude state or local taxation. In our view then, until such time as Congress authorizes state or local property taxation of lands of enrolled tribal members within an Indian reservation, the California Constitution recognizes that such lands are immune from such property taxation."

Notwithstanding the Supreme Court's analysis and language in Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, 36 L Ed. 2d 114, 93 S Ct 1267, McClanahan v. Arizona State Tax Commission (1973) 411 U.S. 164, 36 L Ed 2d 129, 93 S Ct 1259, and Moe v. The Confederated Salish and Kootenai Tribes (1976) 425 U.S. 463, 48 L Ed 2d 96, 96 S Ct 1634, eliminating 25 USC Sec. 349 as a basis of jurisdiction to impose a personal property tax upon the personal property of Indians residing on an Indian reservation, the United States Court of Appeals, Ninth Circuit, has recently held in its amended opinion in Confederated Tribes and Bands of the Yakima Nation v. County of Yakima, et al., No. 88-3926, copy attached, that 25 USC Sec. 349 manifests Congress' 'unmistakably clear' intent to permit states to tax fee patented land owned by members of the Yakima Nation and located within the reservation. If and when this decision becomes final, Section 349 will be authority for state or local property taxation of lands of enrolled tribal members within an Indian reservation. Until then, we suggest that you inform anyone seeking information in this regard that Confederated Tribes and Bands of the Yakima Nation, supra, v. County of Yakima, et al., currently

permits local property taxation of lands of enrolled tribal members within an Indian reservation.

It is not known whether the Confederated Tribes and Bands of the Yakima Nation will permit the decision to become final or petition the United States Supreme Court for hearing. We will keep you advised.

JKM:mw
3283H

Attachment

cc: Honorable Raymond J. Flynn
Humboldt County Assessor
Mr. Earl L. Lucas
State Controller's Office
Mr. John Hagerty
Mr. Gene Palmer
Ms. Rose Marie Carlos
Mr. Joe Nicosia